

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

JOSE LUIS CASTILLEJO,

Defendant.

CASE NO. 1:08 CV 01188

ORDER GRANTING THE
GOVERNMENT'S MOTION TO
DISMISS DEFENDANT'S UNTIMELY
NOTICE OF APPEAL

UNITED STATES DISTRICT JUDGE LESLEY WELLS

On 19 May 2008, Defendant Jose Luis Castillejo ("Mr. Castillejo") pled guilty to a one count Indictment charging him with illegal re-entry into the United States after deportation, in violation of 8 U.S.C. § 1326. (Doc. 13). On 4 September 2008, Mr. Castillejo was sentenced to a period of 46 months custody with the Bureau of Prisons. (Docs. 16, 17). On 7 October 2008, in response to Mr. Castillejo's 6 October 2008 motion for leave to appeal, this Court granted the defendant until 14 October 2008 in which to file his notice of appeal. (Doc. 18). Mr. Castillejo filed his notice of appeal to the Sixth Circuit Court of Appeals on 20 November 2008. (Doc. 20).

Currently before the Court is the government's 21 November 2008 motion to dismiss Mr. Castillejo's appeal. For the reasons discussed below, the government's motion will be granted.

To appeal a sentence, a criminal defendant must file a notice of appeal in the district court within ten days of entry of judgment. Fed. R. App. P. ("FRAP") 4(b)(1)(A). The district court has discretion to extend the time to file the notice "for a period not to exceed thirty days." FRAP 4(b)(4). Thus, under some circumstances, a defendant may have up to a maximum of forty days after the entry of judgment to file a notice of appeal.

Forty days is the "outer limit" for the time within which a notice of appeal can be filed. United States v. Wrice, 954 F.2d 406, 409 (6th Cir. 1992). See also United States v. Cheek, 761 F.2d 461, 462 (8th Cir. 2001) ("[a]fter the forty day period expires, there is nothing that either a district court or a court of appeals can do to extend the time"); United States v. Awalt, 728 F.2d 704, 705 (5th Cir. 1984); United States v. Dumont, 936 F.2d 292, 294-95 (7th Cir. 1991); United States v. Avery, 658 F.2d 759, 761 (10th Cir. 1981).

Mr. Castillejo's 20 November 2008 notice of appeal was filed seventy-seven days from the entry of Judgment on 4 September 2008. Clearly, Mr. Castillejo's notice of appeal exceeds the forty day outer limit set by FRAP 4(b)(1)(A).

Mr. Castillejo's untimely notice of appeal does not divest this Court of jurisdiction to review the government's motion to dismiss. See United States v. Williams, 2006 WL 3203748, 5-7 (6th Cir. 2006). In Williams, the Sixth Circuit described the standard governing when a district court loses jurisdiction upon a party's filing of a notice of appeal to the Sixth Circuit:

